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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 585

MARTIN MAYRATH, PETITIONER,

vs.

THE HUTCHINSON MANUFACTURING COMPANY, a Partnership Composed of HAROLD E. GOETZ and ALBERT J. GOETZ, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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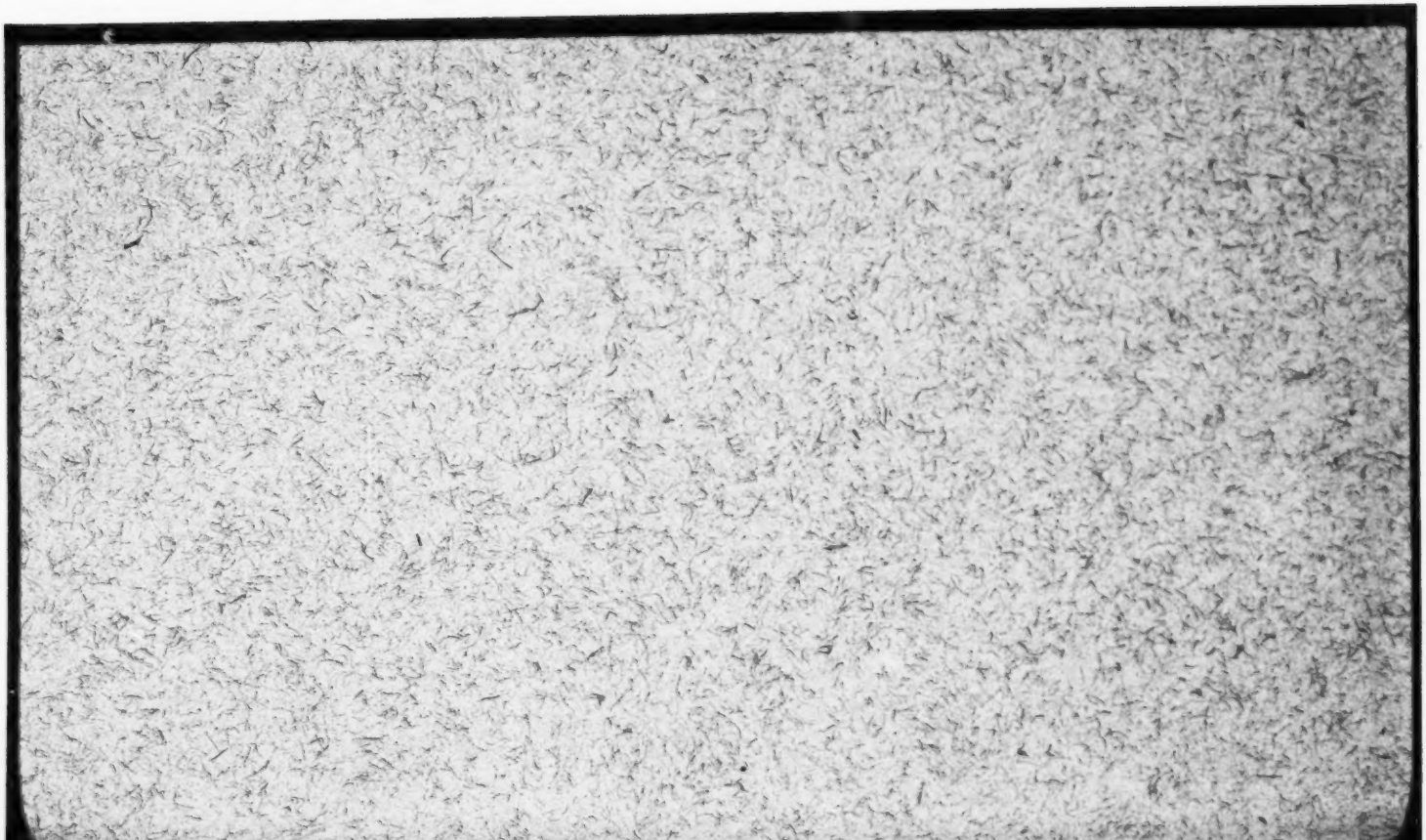

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To The Honorable, The Chief Justice of The United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Martin Mayrath, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit to review the judgment entered by that court reversing the decision of the United States District Court for the District of Kansas in the

above entitled case. A petition for rehearing was duly presented and denied without opinion.

A certified transcript of the record in this case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with Rule 38 of the rules of this Court. Also furnished is a certified book of exhibits containing such original documentary exhibits as are not reproduced in the transcript.

OPINIONS BELOW.

The findings of fact, conclusions of law and opinion of the District Court (R. 36 to 54) are reported at 92 F. Supp. 849. The opinion of the Court of Appeals (R. 287) is reported at 192 F. 2d 110.

JURISDICTION.

The judgment of the Court of Appeals, which Petitioner here seeks reviewed, is dated October 22, 1951, and the order denying the petition for rehearing is dated November 16, 1951 (R. 315).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended June 25, 1948 (28 U. S. C., Sec. 1254(1)), and under Section 5 (b) of Rule 38 of this Court.

QUESTIONS PRESENTED.

1. Are claims 2, 4, 5, 6 and 10 of patent No. 2,483,290 valid?

2. In reversing the District Court's finding that said claims are valid, as defining a true and patentable com-

bination, did the Court of Appeals employ tests and standards which are in conflict with those used by this Honorable Court in its applicable decisions?

3. Is it contrary to patent law and paramount public interest to strike down—for asserted lack of invention—a patent for an ingenious new machine, nowhere disclosed nor suggested in the prior art, that operates in a new way, with improved results, and that

(a) created an important and fast growing business,

(b) provided the farming and grain storage communities with an efficient device that for the first time satisfied a long-felt need, as evidenced by its immediate and wide acceptance, and

(c) was so satisfactory and commercially successful that others were prompted to go into the manufacture of machines which were not merely competitive, but virtually identical to petitioner's machine, these competitive machines being the product of a coldly calculated program of copying, entered upon deliberately with full knowledge of the facts and carried out in the unconscionable belief that cavalier piracy now is beyond the reach of the patent laws?

The last-mentioned question is of immediate general importance to forestall destruction of confidence in the patent laws as an effective instrument for promoting the useful arts by encouraging and protecting new enterprises built on ingenuity and merit. With reference to question No. 2, an affirmative application of the Constitutional standard of invention is sorely needed to check the apparently growing feeling on the part of the lower courts that none but the most extraordinary inventions can meet that standard.

STATUTE INVOLVED.

The statute relied upon is 35 U. S. C. 31, R. S. 4886, the pertinent parts of which are reproduced in Appendix A.

STATEMENT OF THE CASE.

This is an action for infringement of United States Letters Patent 2,483,290, brought by the petitioner, Martin Mayrath (the patentee and owner of the patent) against respondent, The Hutchinson Manufacturing Company, a partnership composed of Harold E. Goetz and Albert J. Goetz (hereinafter sometimes referred to as the "Goetz brothers").

The patent is for the grain loading and handling device illustrated in Fig. 1, which shows one of the commercial units manufactured by the Mayrath company under the

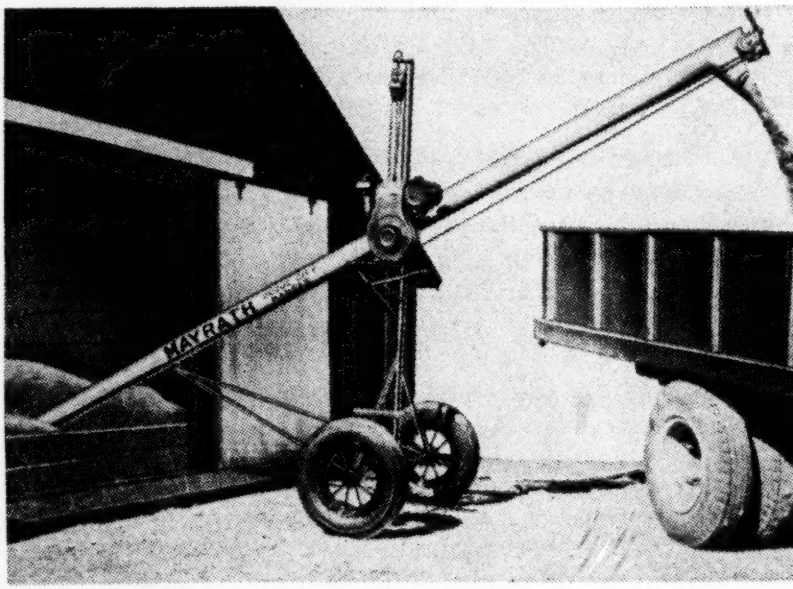

Fig. 1. The patented device in operation.
(Photo from Plf's. Ex. 4)

patent. It utilizes an auger-type conveyor, the intake end of which normally rests on the ground; an integrated carriage, conveyor-supporting assembly and power drive arrangement makes it possible to readily raise or lower the discharge end of the conveyor while at the same time automatically maintaining the prime mover upright and in proper driving relation to the conveyor despite the change in the angular relationship between the prime mover and conveyor. This, together with the mobility of the unit and the ease of manipulation which results from its centrally balanced construction, makes the loader a versatile, all-purpose grain handling unit suitable for varied use on the farm and in grain storage communities.

The Mayrath company engaged in commercial production of these loaders throughout the period that petitioner's application for patent thereon was pending in the Patent Office. During this period and long prior to the issuance of the patent, the father of the Goetz brothers purchased one of the Mayrath loaders and, using it as a model, one of the brothers presently made preliminary sketches of a replica loader they contemplated manufacturing and selling (R. 41). In the same period the Goetz brothers and their father entered into negotiations with petitioner ostensibly for the purchase of his loader manufacturing business and in the course of negotiations visited the Mayrath plant on several occasions, studied the tool equipment and manufacturing methods and obtained information as to sales experience, sources of supply, etc. (R. 41). At least one of the Goetz brothers also was given access to and examined petitioner's then pending application for patent, so had actual knowledge of its contents (R. 49).

Within approximately two months after the negotiations had come to a desultory end, the Goetz brothers had

purchased another manufacturing plant and, as a partnership, were offering to the public grain loaders which were virtual duplicates of the Mayrath machine (R. 40, 41).

When petitioner's patent subsequently issued (a little more than two years later), he promptly instituted this action against respondent in the United States District Court for the District of Kansas. The District Court held claims 2, 4, 5, 6, and 10—all of the claims in issue—valid over the prior art and infringed by respondent.

In reaching this decision, the trial court carefully considered the patents and the state of the art prior to petitioner's invention, then characterized petitioner's conception as "a 'substantial innovation' for which society is truly indebted to him" (R. 53). Recognizing the new mode of operation and improved results achieved by this innovation, the court placed the invention in the category of "an improvement which fills a long-felt need, and which those schooled in the art have not been able to devise" (R. 53).

The respondent's efforts at trial to minimize the innovation and becloud the true value of the improvement did not mislead the trial court; he plainly found the overt act of religiously copying petitioner's device a more convincing testimonial of their true regard for the invention, and said quite pointedly:

> "* * * although both defendants were in the courtroom during the trial and heard testimony to the effect that Harold (Goetz) had admitted copying the patented device and saying: 'We wanted to copy the best one,' neither denied such copying or the making of that admission. * * * The differences in the two devices were largely inconsequential and the testimony of the defendant who testified with reference to them and how they were designed, was unconvincing" (R. 53).

> "So nearly alike are the patented and the accused loaders that a general description of the design and operation of one substantially outlines the design and operation of the other" (R. 41).

The trial court also took into consideration the immediate and very substantial commercial success which greeted petitioner's grain loader upon its introduction in the field. In its findings of fact the court said (R. 39):

> "9. After completion of the fourth model and while plaintiff's application for patent was pending, he began to manufacture grain loaders for the commercial market and during the year 1945 his company made and sold approximately 200 loaders.* During 1946 approximately 2,500 were sold* and in each of the years 1947, 1948, and 1949, approximately 6,000 loaders were produced (T. 61-62, 103). Plaintiff's loaders were, and are, commercially successful. During the years 1947 and 1948 he sold about one third of all auger type grain loaders manufactured in this country and did about one half of the total dollar volume business in auger type loaders" (T. 349-351; Plf's. Ex. 19).

On appeal by respondent, the Court of Appeals said: "If the claims are valid, infringement is admitted," but it reversed the decision of the District Court on the question of validity. In so doing, the appellate tribunal found no error in the holdings of the trial court with respect to the commercial success of petitioner's loader and the copying thereof by respondent; as a matter of fact, neither of these factors was given even fleeting recognition in its decision. Like the District Court, it found, "No prior patent or disclosure shows all of the elements of any one

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*Manufacture began in November of 1945, so the sales figure for that year represents less than two months actual production (R. 63); in 1946 a fire burned the Mayrath plant to the ground (R. 71), severely curtailing production for the year.

of the claims in a single device" (R. 289), but on the question of whether the combining of these elements was invention, it reached a different conclusion:

> "We are of the opinion that the respective individual functions of well-known elements drawn from prior art patents are not changed or increased when assembled in the device of the patent in suit and that they produce no result other than the aggregate results of such functions. They are not so united that by their reciprocal influence upon each other or their joint action on a common objective they perform additional functions and accomplish additional results. In other words, they do not meet the test laid down in *Great A. & P. Tea Company* v. *Supermarket Equipment Company,* 340 U. S. 147, 151, 152, that the whole must in some way exceed the sum of its parts" (R. 292).

The Court of Appeals' decision was thus predicated squarely upon its conception of the functioning or operation of petitioner's device, and this conception it outlined as follows (R. 289):

> "The functions of the elements in the claims, read in the light of the stated objects of the claimed invention, are to effect such adjustments and thereby place the tube in a desired operating position and obtain a desired belt tension. The adjustments are made and such functions are performed *before the device is put into operation.** When the adjustments are made, the function of the several adjusting means *is completed* and the respective adjusting functions of such means produce no result other than the aggregate results of such functions. True, the elements of the claims perform other functions during the operation of the machine, but they have no relation to the stated objects of the claimed invention. *The adjusting means perform no function during the opera-*

*Emphasis added throughout.

tion of the device to produce a new or better loading result."

This description of the functioning or mode of operation of petitioner's device, upon which the Court of Appeals based its appraisal of the inventiveness involved in combining the elements as specified in the claims, unfortunately represents an incomplete and inaccurate picture of the true mode of operation, as the trial court on the other hand well understood, having seen demonstrations of a model of the Mayrath loader and having heard Mayrath testify as follows, with regard to the adjustment of the auger or screw conveyor:

> "A. We made it vertically adjustable for the reason that, loading into bins in particular and going into grain sheds and barns, the height of the door openings and the height of the bin openings varied between farms a great deal. One farmer wants a loader to go up eight feet high and the next one wants one to go up eighteen feet high, and you need considerable range of elevation for that reason. *Another reason is that it is more efficient, if you are going to pile grain in a pile eighteen feet high, to start out piling it at your lowest height;* it will be saving gasoline and horsepower because, until the grain piles up to that eight-foot height you are beginning at, we will say, you don't need to raise the loader. *You only need to put the loader in its extreme height when your grain is piled up that high"* (R. 66-67).
>
> * * * * * * *
>
> "A. The original reason for putting the loader on wheels was to save moving the grain to the loader. * * * In the case of this model also, the wheels are necessary so that the intake end may be held stationary in the pile and not be pulled out of the material *it is moving* as (the discharge end of) the loader is raised; the wheels travel back, the center of gravity is approximately over the wheels and were there no wheels

at this point, the center of gravity would act down with sufficient pressure to pull the intake end out of the grain *and stop the loader from moving grain*" (R. 67).

* * * * * * *

"A. Normally in that case you locate the discharge end approximately over the center of the body of the truck and you locate it as low as possible. *When the outlet end is down near the truck and the truck fills up and you want to heap the pile* * * * *you raise the outlet end so you get more height*" (R. 90).

Thus, as the Court of Appeals plainly failed to appreciate, the elements recited in the claims are involved in more than mere preliminary adjustments of the loader; they play an important part in making a vertical adjustment possible while the loader is in operation—and this without interfering with such operation. It thus was upon an erroneous premise that the court below reached its conclusion that the invention claimed was an aggregation rather than a patentable combination.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1. In holding claims 2, 4, 5, 6, and 10 of patent No. 2,483,290 invalid.

2. In failing to find that said claims define a new and patentable combination of elements which cooperate in a new way and, by their conjoint action, produce an improved result, thus distinguishing from *Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Company,* 340 U. S. 147.

3. In deciding that the elements of the claims which relate to the adjustment or positioning of petitioner's loader perform no function during the loading operation to produce a better loading result.

4. In failing to give consideration to any of the following factors, as bearing on the question of whether invention was present in petitioner's creation of a grain loader embodying the combination called for by the claims:

   (a) the long-felt need that had existed prior to introduction of petitioner's loader, notwithstanding the existence of various elements of the combination in assorted prior art devices, as exemplified by the patents relied upon as anticipatory.

   (b) the immediate and pronounced commercial success which greeted petitioner's loader when it was introduced.

   (c) the persuasive evidence of invention implicit in respondent's religious copying of the petitioner's loader and the emphasis which respondent's advertising placed on features that stem from the claimed combination.

REASONS FOR GRANTING THE WRIT.

I.

The court below misapplied *Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Company*, 340 U. S. 147, wherein this Court properly held invention to be lacking in a mere extension of a sales counter, especially where the extension was not in fact included in any of the claims and the claims actually recited nothing more than a collection of old, unmodified elements which did not "perform any additional or different function in the combination than they perform out of it."

Examined in light of the criteria of invention set forth in that decision, it is plainly evident that the claims in issue here meet every test the *Supermarket* cashier's stand

failed to meet, and are valid. When the various elements recited in petitioner's claims are combined in the manner specified, an articulated mechanism is formed in which there is such integrated coaction or mutual interaction of parts as to result in the automatic maintenance of predetermined physical relationships between components, notwithstanding permissible movements, *i. e.*, spatial and angular adjustments, of parts of the mechanism relative to one another (R. 42, 65-69, 88-90).

The trial court (which had the best opportunity to evaluate and judge petitioner's machine in comparison to the prior art) recognized the foregoing when it said in its Finding of Fact No. 16 (R. 42):

> "The motor remains approximately level as the conveyor tube is adjusted vertically; the motor is slidably mounted on the motor mount so that it may be horizontally adjusted as the belt stretches or shrinks due to normal wear and weather conditions; the pulley and belt mechanism does not need readjustment after raising or lowering of the conveyor tube; the intake end remains stationary as the angle of the conveyor tube is changed; the center of gravity remains over the wheels, thereby balancing the loader; and, the slidable sleeve is relatively easy to adjust on the vertical post because of the manner in which the tube and motor is mounted on the sleeve (Ex. P)."

The raising or lowering of the discharge end of the conveyor tube while maintaining the intake end fixed on the ground involves not only a change in the inclination of the conveyor but also a lateral shift in its center of gravity; under these circumstances, to automatically effect a corresponding lateral shift of the carriage so the center of gravity remains over the wheels and simultaneously effect a vertical movement of the engine while maintaining it up-

right and in proper driving relation to the conveyor despite the change in the angular relation of the conveyor to the engine, is an improved form of action which clearly flows from a conjunction or concert of the elements—an action which exceeds the mere sum of the parts considered in a purely cumulative sense.

This concerted action is not found in the prior art as the trial court recognized when it said (R. 53): "patentee's conception is a 'substantial innovation' for which society is truly indebted to him," his improvement being one "which those schooled in the art have not been able to devise." Here the elements of the claimed combination clearly perform an additional or different function in the combination than they theretofore had performed out of it, and the impliedly contrary finding of the Court of Appeals stemmed, as has been shown, *supra*, from a misconception or misunderstanding of the operation of the loader, an error which is very clear on the face of the record.

In the last analysis, what the court below has found is simply that each of the prior art patents shows some but not all of the elements of the claims in issue. Having in mind that the distinctive operational advantages of petitioner's machine can only be achieved through the interplay of a particular combination of elements which is outside the scope of the prior art devices, the decision of the Court of Appeals amounts to a holding that if the function of the individual elements *per se* is old, the integrating of those functions and elements in a new way to produce a better result can never be invention. Such a holding is directly opposed to the applicable patent law as announced by this Court in many decisions. *Keystone Manufacturing Company* v. *Adams*, 151 U. S. 139; *Diamond Rubber Company* v. *Consolidated Tire Company*, 220 U. S. 428;

Leeds and Catlin v. *Victor Talking Machine Company*, 213 U. S. 301; *Williams Manufacturing Company* v. *United Shoe Machinery Corporation*, 316 U. S. 364; *Goodyear Tire & Rubber Company, Inc., et al.* v. *Ray-O-Vac Company*, 321 U. S. 275; *Faulkner* v. *Gibbs*, 338 U. S. 267.

Petitioner's grain loader meets the criteria of invention found in all these decisions, as well as what this Court has characterized as the "rather severe" test of *Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Company*, *supra*. Unlike the situation dealt with by this Court in the latter case and subsequently in *Crest Specialty* v. *Trager*, 95 L. Ed. 532, the patent here under consideration withdraws into its field of monopoly nothing that was already known. In no way does it diminish the resources previously available to skillful men, but on the contrary it pushes back the frontiers of applied science and the useful arts in a very practical way.

II.

The Mayrath grain loader is a classic example of the kind of invention that the Constitutional provision and the patent laws are designed to encourage by holding out the promise of patent protection to inventors. Admittedly less startling than the atomic bomb, it nevertheless is far from being a trivial "gadget" beyond the pale of the protection contemplated by the Framers of the Constitution. It advances one of the most essential arts of our time—agriculture—by providing it with a new tool whose versatility and operational advantages were not only surprising in themselves but gave unexpected impetus to the mechanization of grain handling operations that theretofore had been carried out by hand or left undone out of economic necessity (R. 66-67, 82, 90-91).

The wheat farmer's annual crop must be loaded or "turned" to dry and aerate it, not once but several times in the course of a season. In a single day petitioner's machine can easily load or turn 15,000 bushels, accomplishing at a cost of three or four gallons of gasoline a task which, if carried out by hand, would take many days of strenuous labor. But even this miracle of efficiency would be of no practical value if its accomplishment required a machine so complicated that it called for a skilled mechanic to operate it, or so costly that the individual farmer could not own it. Petitioner's telescoping of functions by making each part do the work of several put the machine into the "useful" category so far as the farmer is concerned.

Thus was achieved the mobility and light weight which makes the unit easily movable not only from job to job as the occasion demands, but also from place to place on any given job, avoiding the necessity of shoveling the grain to the intake end of the conveyor (as is particularly important, for example, in turning grain that is spread over a considerable area). The vertical adjustability of the discharge height of the conveyor not only permits its use with bins and trucks of different height but also permits maximum efficiency of operation by starting at a low elevation and raising the discharge end during operation of the conveyor as the pile below it increases in height. Such adjustment does not disturb the central balance of the unit, the upright position of the gasoline engine nor the driving system between the engine and the conveyor, so requires no interruption of the loading operation.

To the wheat farmer, the versatile, all-purpose device resulting from this combination of features means a saving of time, cost and labor, together with increased production

of properly (because promptly) handled grain. Approximately 27,000 Mayrath loaders already were in use when this case came to trial in 1949, and the number was increasing steadily at a rate of approximately 500 a month.*

III.

The Court below gave *no consideration whatever* to certain material evidence and settled facts which, while not in and of themselves conclusive of the question of invention, nevertheless bear importantly on that question and should have been considered under the circumstances presented here. Among these are:

(a) the fact that notwithstanding the existence of the prior art devices, there was a long-felt need which was not satisfied until the appearance of petitioner's device on the market (R. 53) and

(b) the fact that response to petitioner's improvement was immediate (R. 63); the enduring and substantial commercial success of the device is undisputed (R. 39).

Admittedly, commercial success cannot *supply* invention where such inherently is lacking; but where as here the prior art at most only raises a doubt and does not clearly and conclusively overcome the presumption of invention which inheres in the patent grant, it is well settled that commercial success should be considered. As this Honorable Court said in *Goodyear Tire & Rubber Company, Inc., et al.* v. *Ray-O-Vac Company,* 321 U. S. 275, 279:

> "Viewed after the event, the means Anthony adopted seem simple and such as would have been

*Petitioner's sales figures alone (R. 39); respondent's sales not known.

> obvious to those who worked in the field, but this is not enough to negative invention. During a period of half a century, in which the use of flashlight batteries increased enormously, and the manufacturers of flashlight cells were conscious of the defects in them, no one devised a method of curing such defects. Once the method was discovered it commended itself to the public as evidenced by marked commercial success. These factors are entitled to weight in determining whether the improvement amounted to invention and should, in a close case, tip the scales in favor of patentability."

Thus, while not itself invention, nor conclusive evidence thereof, the utility of the change wrought by an inventor, as attested by its widespread acceptance in the industry, has as a practical matter been accorded the greatest weight in determining invention. *Diamond Rubber Company* v. *Consolidated Rubber Tire Company,* 220 U. S. 428; *Eibel Process Company* v. *Minnesota & Ontario Paper Company,* 261 U. S. 45; *Minerals Separation* v. *Hyde,* 242 U. S. 261; *Richmond Screw Anchor Company* v. *United States,* 275 U. S. 331; *Webster Loom Company* v. *Higgins,* 105 U. S. 580. In the *Diamond Rubber Company* case, this Court said:

> "Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. *But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration.*"

In the *Diamond Rubber Company* case, this Court also made the following pertinent observation with respect to evaluating the patentee's contribution to the art:

> "It is conceded, as we have said, that his invention is a narrow one—a step beyond the prior art—built upon it, it may be, and only an improvement upon it. Its legal evasion may be the easier, and hence *we see the strength of the concession to its advance beyond the prior art and its novelty and utility by Rubber Company's imitation of it.* The prior art was open to the Rubber Company. * * * And yet the Rubber Company uses the Grant tire. It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation as others have done. And yet the narrowness of the claims seemed to make legal evasion easy. Why, then, was there not evasion by a variation of the details of the patented arrangement? * * * We can find no answer except that given by the Tire Company: 'The patented organization must be one that is essential. Its use in the precise form described and shown in the patent must be inevitably necessary.' "

As was true in the *Diamond Rubber* case, no one pays Mayrath's invention higher praise than does the respondent here, for, with all the lauded prior art at its command, it offers the sincerest form of flattery—imitation. If the imitation was carried out by larcenous methods,* at least the motive is clear enough:

> *"We wanted to copy the best one"* (R. 53).

Ill, indeed, does it lie in respondent's mouth to disparage in court the petitioner's contribution to the art, while at the same time by its conduct and in its advertising literature (Plf's. Ex. 5) it is declaiming the virtues and advantages of the invention to the rest of the world.

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*See page 5, *ante*.

Where as here the prior art does not clearly and conclusively overcome the presumption of validity of the claims in issue, it is submitted that the respondent's admitted imitation of petitioner's device rather than the prior art is a significant factor which deserves consideration in resolving any doubt on the matter. The court below ignored this factor and such is believed to have been error.

IV.

More important to this nation than the fate of the Mayrath patent (validly patented or not, his contribution and its benefits are now being realized by society) is the very real danger that other equally valuable and more valuable contributions will be delayed in birth or stifled altogether as a result of increasingly general application by the lower courts of a standard of invention higher than that established or intended by the actual holdings of this court—the danger, in other words, that lower courts will (and have) raised the standard so high in fancied obedience to the recent decisions in *Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Company* and *Crest Specialty* v. *Trager, supra,* that Constitutional and Congressional intents will be completely lost.

Those recent cases could scarcely have been decided otherwise in view of the trivial subject matter involved, but to extend the holdings therein to invalidate a meritorious combination as the court below has done in the present case can only have the unintended and deplorable effect of stifling invention.

Petitioner is confident that this Court would agree that our national economy and the industry which has made us great cannot run indefinitely on the basic technological fuel of the last hundred, or even the last ten

years; each generation must do its own advancing, and the need for stimulus to inventors as a class is as real now as it ever was. This court has not hesitated to grant the protection authorized by Congress under the Constitution to those few inventions of merit which have come within its reach. In *Graver Tank & Manufacturing Company, Inc., et al.* v. *Linde Air Products Company,* 336 U. S. 271, this Court unanimously upheld patent claims on a highly meritorious welding flux; thereafter in *Faulkner* v. *Gibbs,* 338 U. S. 267, the Court upheld (with only one Justice dissenting) claims to a game machine, distinguishing *Halliburton Oil Well Cement Company* v. *Walker,* 329 U. S. 1, on the ground that the patentee Gibbs claimed a combination of elements wherein invention was in the fact of combination rather than the novelty of any particular element.* Clearly, this Court is not carelessly striking down all patents and has a reasonable standard which should be followed, *not exceeded,* by lower tribunals. Notwithstanding this, the strong language used in its more recent opinions—and properly so used in view of the nature of the patents involved—is unquestionably having an effect upon the lower courts which results in denial of protection to important and non-frivolous combinations.

While astute counsel and learned judges may be able to derive a fair standard of invention from the totality of this Court's decisions, the great innate authority of such decisions may of itself lead the lower courts and the class of inventors who are the source of our technical advance (and the intended recipients of the patent award) into an over pessimistic view of the value of the promised 17-year limited monopoly, and thereby devitalize the intent expressed in the Constitution. The Court does right

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*Other patents upheld by this Court in the past ten years tabulated in Appendix B, *infra*.

to throw the rotten apples out of the barrel; but the youth near-by may mimic the act without first inspecting the apple and thus drive the owner of the apples from orcharding.

The granting of this petition will provide a further needed guidepost in aid of the always-elusive standard of invention; and even if, at last, petitioner's patent be lost to him, may serve to reassure inventors and industry, as well as the lower courts, that the standard has not become impossibly high (and hence completely vanished) since the *Graver* and *Faulkner* decisions.

CONCLUSION.

For the foregoing reasons, your petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A.

The Constitutional Provision.

Art. I, Sec. 8. The Congress shall have power * * * To promote the progress of science *and the useful arts,* by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

35 U. S. C. 31, R. S. 4886.

Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or *any new and useful improvements thereof,* * * * not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.

APPENDIX B.

In the past ten years, patents for improvements have been upheld by this Court in the following cases:

Exhibit Supply Company v. *Ace Patents Corporation*, 315 U. S. 126.	(Pinball machine switch)
Williams Manufacturing Co. v. *United Shoe Machinery Corp.*, 316 U. S. 364.	(Automatic shoe machinery)
Goodyear Tire & Rubber Co., Inc., v. *Ray-O-Vac Company*, 321 U. S. 275.	(Leakproof dry battery)
Graver Tank & Mfg. Co., Inc., et al. v. *Linde Air Products Co.*, 336 U. S. 271	(Welding flux composition)
Faulkner v. *Gibbs*, 338 U. S 267.	(Pinball machine)

(Note: The foregoing list includes only those cases which were treated in express opinions of this Court, no attempt being made to take account of the considerable number of patents left valid as a result of the Court's denial of certiorari.)